152 U.S. 512

RECORD, CASE No. 14,288.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 264.

THE CITY NATIONAL BANK OF FORT WORTH, APPELLANT,

vs.

R. D. HUNTER, A. G. EVANS, AND M. P. BUEL, PARTNERS UNDER THE FIRM NAME OF HUNTER, EVANS & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

FILED OCTOBER 15, 1890.

RECORD, CASE No. 14,288.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 264.

THE CITY NATIONAL BANK OF FORT WORTH, APPELLANT,

vs.

R. D. HUNTER, A. G. EVANS, AND M. P. BUEL, PARTNERS UNDER THE FIRM NAME OF HUNTER, EVANS & CO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS.

INDEX.

	Original.	Print.
Caption	1	1
Agreement as to composition of record	2	1
Agreement as to time of deposit of money in bank, etc	4	2
Agreement of settlement by Dawson, etc	6	2
Decree of court	8	3
Petition for appeal	10	4
Order granting appeal to defendant bank	11	5
Appeal bond	12	5
Assignment of errors	15	6
Certificate of clerk	17	7

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 1, 1893.

1 *Caption and Style of Cause.*

Be it remembered that at a term of the circuit court of the United States within and for the fifth judicial circuit and northern district of Texas, at Dallas, which convened on the 19th day of May, 1890, and adjourned on the 9th day of June, 1890—present and presiding, the Honorable A. P. McCormick, United States district judge—the following cause, among others, came on for trial, to wit:

HUNTER, EVANS & CO.
vs.
J. A. O'NEAL *et al.* } No. 21. Equity.

2 In U. S. Circuit Court for Northern District of Texas, at Dallas.

CITY NAT'L BANK OF FORT WORTH
vs.
HUNTER, EVANS & CO.

Whereas the above-entitled cause has once been appealed to the Supreme Court of the United States and a decision by said court having been rendered therein, which is found in volume 129, page 557, Sup. Ct. Reports, in case #116; and whereas it is not deemed necessary to incur the expense of making out a full transcript of the pleadings and evidence used on the last trial in the circuit court:

It is, therefore, agreed that the clerk of the said circuit court may omit from the transcript the pleadings in this cause and all the evidence, except—

1. This agreement.
2. The agreement signed by the parties as to evidence in regard to the time and nature of the deposit of money in the City National bank.
3. Dawson's agreement of settlement or release of damages.
4. The decree of the court.
5. The petition for allowance of appeal.
6. The order granting leave to appeal.
7. The appeal bond.
8. The assignment of errors.

And the Supreme Court is respectfully referred to the transcript in the first appeal, which is reported, as above stated, in volume 129, page 557, Sup. Ct. Reports.

This agreement does not waive any objection to jurisdiction or to affirmance with damages or any other matter than that of
3 composition of the record.

F. W. BALL,
Per W. W. LEAKE,
Appellant's Solicitors.
A. T. WATTS &
SAWNIE ROBERTSON,
Appel-ees' Solicitors.

The foregoing is endorsed as follows, to wit:

21. Equity. City Nat'l Bank of Fort Worth *vs.* Hunter, Evans & Co. Agreement. Filed July 21st, 1890. J. H. Finks, clerk, by Chas H. Lednum, deputy.

4 HUNTER, EVANS & CO.)
vs.) Agreement.
JOHN A. O'NEAL & JOHN DAWSON *et al.*)

It is agreed between Hunter, Evans & Co., on the one part, and the City National Bank of Fort Worth, Texas, on the other part, that the proceeds of the cattle in controversy in this case were paid over to James F. Ellis, one of the securities on the replevin bond, who, for himself and as agent for the other securities on said bond, accompanied said cattle to the Indian Territory and collected the balance due on the note from Dawson to Hunter, Evans & Co. and said City National bank, and that said Ellis, on behalf of himself and said other securities on said bond, deposited said amount collected by him in said City National bank as a general deposit, with the understanding that said money should remain on deposit in said bank to abide the determination of this suit for the purpose of indemnifying them, said securities, against any loss by reason of their signing said bond.

Said deposit was made in the name of the "Dawson bond account," and the amount has remained and still remains on general deposit as aforesaid in said bank.

It is further agreed that said deposit was made at the following dates and in the following amounts respectively:

1. June 26th, 1880, three thousand one hundred and twenty-eight dollars.
2. August 3rd, 1880, five thousand dollars.
3. August 6th, 1880, five thousand six hundred and forty-four dollars.

5 Total amount deposited, thirteen thousand seven hundred and seventy-two dollars, which, as other general deposits, has been used by the bank as other of its funds.

It is further agreed that this agreement shall stand in lieu of answer to plaintiffs' bill of discovery, and answer to same is hereby waived.

BALL & McCART, *Att'ys for Def't Bank.*
A. G. WATTS & SAWNIE ROBERTSON,
Counsel for Comp'ts.

The foregoing is endorsed as follows, to wit:

21. Equity. Filed Oct. 9th, 1889. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

6 THE STATE OF TEXAS,)
County of Dallas.)

Whereas in a certain suit pending in the circuit court of the United States for the northern district of Texas, at Dallas—

Wherein Hunter, Evans & Co. are complainants and John Daw-

son, City National Bank of Fort Worth, *et al.* are defendants, the said John Dawson set up and asserted a certain claim for damages against said Hunter, Evans & Co., claimed to have resulted to him by reason of the wrongful/ issuance of a writ of sequestration in said cause while pending in the district court of Montague county, Texas, and the seizure by virtue thereof of a certain lot of cattle, branded O N, by the sheriff of Montague county:

Therefore know all men by these presents that I, John Dawson, of Dallas county, Texas, for and in *the* consideration of the sum of five hundred dollars to me in hand paid by said Hunter, Evans Co., the receipt of which is hereby acknowledged, have this day and do hereby release and relinquish to the said Hunter, Evans & Co. my entire claim for damages as aforesaid set up in said cause; and I have accepted said sum of five hundred dollars in full settlement and satisfaction of said claim, and agree to abandon and withdraw said claim, and to that end hereby authorize the solicitors of said Hunter, Evans & Co. to have an order entered in said cause to that effect this April 3rd, 1889.

J. M. DAWSON.

Witness:
T. J. FREEMAN, JR.
A. T. WATTS.

7 The foregoing is endorsed as follows, to wit:
Hunter, Evans & Co. *vs.* John Dawson *et al.* Agreement of settlement.

8 HUNTER, EVANS & CO.
vs.
JOHN A. O'NEAL & Others. } No. 21. Chancery.

JUNE 2ND, 1890.

This cause came on to be further heard in accordance with the directions of the Supreme Court of the United States, contained in its mandate and opinion on file herein, at this term, and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

That the defendant John Dawson take nothing by his plea in reconvention herein, and the same is hereby dismissed. It is further ordered, adjudged, and decreed that said defendant, John Dawson, have and recover of and from the complainants, R. D. Hunter, A. G. Evans, and R. P. Buel, his costs in this behalf incurred, for which execution may issue.

It is further ordered, adjudged, and decreed that the said complainants, R. D. Hunter, A. G. Evans, and R. P. Buel, take nothing by their bill of complaint against the defendant Mary O'Neal, as administratrix of the estate of John O'Neal, deceased, and that said defendant, Mary O'Neal, have and recover of and from said complainants, R. D. Hunter, A. G. Evans, and R. P. Buel, all costs in this behalf incurred, for which execution may issue.

It is further ordered, adjudged, and decreed that said complainants, R. D. Hunter, A. G. Evans, and R. P. Buel, do have and re-

cover of and from the defendants The City National Bank of Fort Worth the sum of twelve thousand nine hundred and eighty-four and $\frac{85}{100}$ ($12,984.85) dollars, together with interest thereon
9 from this date at the rate of eight per cent. per annum.

It is further ordered, adjudged, and decreed that all costs accrued in this cause up to September 30th, 1881, be, and the same *is* hereby, adjudged against said complainants, R. D. Hunter, A. G. Evans, and R. P. Buel, and for which let execution issue; and, as the costs of the Supreme Court have been allowed against said complainants, all other costs incurred herein which have not been otherwise adjudged be, and the same *is* hereby, adjudged against said defendant, The City National Bank of Fort Worth.

And it is further ordered, adjudged, and decreed that if this decree is not fully satisfied by said defendant, The City National Bank of Forth Worth, within forty days from this date, then let execution issue against said defendant for the monies herein adjudged against it.

A. P. McCORMICK,
U. S. Dist. Judge.

The foregoing is endorsed as follows, to wit:

21. Equity. Hunter, Evans & Co. *vs.* O'Neal *et al.* Decree. Filed June 2nd, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

10 In the United States Circuit Court for the Northern District of Texas, at Dallas. In Chancery.

HUNTER, EVANS & CO. }
vs. } No. —.
JOHN A. O'NEAL *et al.* }

And now in this case, in which Hunter, Evans & Co., a firm composed of R. D. Hunter, A. G. Evans, and M. P. Buel, are plaintiffs and John Dawson and The City National Bank of Fort Wort- and M. J. O'Neal, as administratrix of the estate of John O'Neal, deceased, are defendants, comes the City National Bank of Fort Worth and prays the court that it be allowed an appeal of this cause as to itself and against the plaintiffs, R. D. Hunter, A. G. Evans, and M. P. Buel, to the Supreme Court of the United States, and that this court fix the amount of a supersedeas appeal bond to be given by it for such appeal, and that an order allowing it such appeal be entered in the minutes of this court, and that, upon its executing and filing such appeal bond, all further proceedings under said decree be suspended to abide the decree of the Supreme Court of the United States; and as in duty, &c etc.

BALL & BALL,
Solicitors for Defendant
The City National Bank of Fort Worth.

The foregoing is endorsed as follows, to wit:

No. 21. Hunter, Evans & Co. *vs.* John A. O'Neal *et al.* Petition for order granting appeal to bank. Filed June 2nd, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

11 HUNTER, EVANS & CO. *vs.* JOHN A. O'NEAL *et al.* } No. 21. In Chancery.

Be it remembered that on this the 2nd day of June, 1890, in the year of our Lord one thousand eight hundred and ninety, in this case, in which Hunter, Evans & Co., a firm composed of R. D. Hunter, A. G. Evans, and M. P. Buel, are plaintiffs and John Dawson and The City National Bank of Fort Wort- and M. J. O'Neal, as administratrix of the estate of John O'Neal, are defendants, one of the said defendants—that is to say, the said City National Bank of Fort Wort—came into open court by its counsel and prayed that it be allowed an appeal of this cause against the plaintiffs, R. D. Hunter, A. G. Evans, and M. P. Buel, to the Supreme Court of the United States, which appeal is now by the court allowed, and the supersedeas appeal bond to be given is fixed at the sum of twenty thousand ($20,000.00) dollars. A. P. McCORMICK,
U. S. Dist. Judge.

The foregoing is endorsed as follows, to wit:
Hunter, Evans & Co. *vs.* John A. O'Neal *et al.* Memo. for order granting appeal to def't bank. Filed June 2nd, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

12 Know all men by these presents that we, The City National Bank of Fort Worth, as principal, and Max Elser, J. C. McCarthy, R. E. McAnulty, J. O. Sandidge, and Robert McCart, as sureties, are held and firmly bound unto R. D. Hunter, A. G. Evans, and M. P. Buel, partners under the firm name of Hunter, Evans & Co., in the full and just sum of twenty thousand dollars, to be paid to the said R. D. Hunter, A. G. Evans, and M. P. Buel, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 2nd day of June, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a term of the circuit court of the United States for the northern district of Texas, at Dallas, in a suit depending in said court between the said R. D. Hunter, A. G. Evans, and M. P. Buel, in their firm name of Hunter, Evans and Company, as plaintiffs, and M. J. O'Neal, as administratrix of the said John O'Neal, deceased, and The City National Bank of Fort Worth and John Dawson, as defendants, a decree was rendered against the City National Bank of Fort Worth, and the said national bank having obtained from the judge of said circuit court an allowance of appeal from said decree to the Supreme Court of the United States and caused said allowance to be entered in the minutes of said court on the 2nd day of June, in the year of our Lord one thousand eight hundred and ninety, to reverse the decree in the aforesaid suit, said allowance of appeal having been procured in open court at the time at which said decree was rendered:

Now, the condition of the above obligation is such that if the said City National Bank of Fort Worth shall prosecute its
13 said appeal to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Witness our hands and scrolls for seals this 2nd day of June, 1890.

CITY NATIONAL BANK OF FORT WORTH.
By MAX ELSER, *Cash.* [L. S.]
MAX ELSER. [L. S.]
JNO. C. McCARTHY. [L. S.]
R. E. McANULTY. [L. S.]
J. Q. SANDIDGE. [L. S.]
ROBT. McCART. [L. S.]

Witness:
T. W. BALL.
N. P. BALL.

Approved.
A. P. McCORMICK,
U. S. Dist. Judge.

THE STATE OF TEXAS, }
County of Tarrant. }

I, John P. King, clerk of the county court in and for said county of Tarrant, do hereby certify that Jno. C. McCarthy, R. E. McAnulty, J. Q. Sandidge, Rob't McCart, and Max Elser, whose names appear signed to the annexed bond,— in my opinion good and ample security for the amount therein specified; that each of whom have property in said county subject to execution of a large amount, and that if said bond was offered to me for approval the same would be accepted and approved.

To certify which I hereunto set my hand and im-
[SEAL.] press my official seal, at office, in the city of Fort Worth, Texas, on this the 5th day of June, 1890.

11 JNO. P. KING,
Clerk of the County Court, Tarrant County, Texas.

The foregoing is endorsed as follows, to wit:

No. 21. Hunter, Evans & Co. *vs.* John A. O'Neal *et al.* Appeal bond of def't bank. Filed June 6th, 1890. J. H. Finks, clerk, by Chas. H. Ledbum, deputy.

15 In the United States Circuit Court for the Northern District of Texas, at Dallas. In Chancery.

HUNTER, EVANS & CO. }
vs. } No. 21. Assignment of Errors.
JOHN O'NEAL *et al.* }

And now comes defendant The City National Bank of Fort Worth in the above cause and says that errors were committed on

the hearing thereof in the circuit court, for which said cause should be reversed, as follows, to wit:

1st. Because the court erred as to the said defendant bank by giving to plaintiffs, as against said bank, interest on said plaintiffs' portion of the fund to be divided, when the evidence showed that said money was deposited as a general deposit by the sureties on John Dawson's replevy bond, and that said bank was not and never had been in default in any way to plaintiffs, and for the further reason that the opinion of the honorable Supreme Court in no way indicates that plaintiffs are entitled to any interest as against said defendant bank.

2nd. Because the court erred in awarding costs against said defendant bank, when under the said opinion of the honorable Supreme Court no part of said costs could or should have been awarded against said defendant.

BALL & BALL,
Solicitors for City National Bank of Fort Worth.

The foregoing is endorsed as follows, to wit:

16 No. 21. Hunter, Evans & Co. *vs.* John A. O'Neal *et al.* Assignment of errors of def't bank. Filed June 2nd, 1890. J. H. Finks, clerk, by Chas. H. Lednum, deputy.

17 *Clerk's Certificate.*

I, J. H. Finks, clerk of the circuit court of the United States in and for the fifth circuit and northern district of Texas, do hereby certify that the above and foregoing is a full, true, and correct transcript of the record in cause numbered 21, equity, wherein Hunter, Evans & Co. are complainants and J. A. O'Neal *et al.* are respondents, lately pending in said court, at Dallas, Texas, as the same is made up in accordance with the agreement of the parties herein.

In testimony whereof I have hereto affixed the seal of said court, at Dallas, Texas, and signed the name of the clerk thereof on this the 3rd day of October, A. D. 1890.

The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.

J. H. FINKS,
Clerk of said Circuit Court,
By CHAS. H. LEDNUM, *Deputy.*

Endorsed on cover: Case No. 14,288. N. Texas C. C. U. S. No. 264. The City National Bank of Fort Worth, appellant, *vs.* R. D. Hunter, A. G. Evans, and M. P. Buel, partners under the firm name of Hunter, Evans & Co. Filed October 15, 1890.

Office Supreme Court U. S.
FILED.
FEB 15 1894
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

October Term, 1893.

THE CITY NATIONAL BANK OF FORT WORTH, Appellant,

vs.

R. D. HUNTER AND OTHERS.

No. 264.

Appeal From the Circuit Court of the United States for the Northern District of Texas.

BRIEF FOR APPELLANT.

On a previous visit of this case to us here, this court, with great detail, after a most thorough and searching examination of the pleadings, and a direct application of the same to the facts, settled the rights of the different parties, including interest, stating most clearly what rates of interest should be allowed, reversed the case, and remanded it to be proceeded with "*in conformity with this opinion.*" (129 U. S., 557–79.)

The case went back and was there proceeded with, and, among other things, a decree was rendered against appellant for $12,984.85, with interest from the date of the decree (June 2, 1890) at the rate of 8 per cent. per annum, and for certain costs (Rec., 3 and 4); and to so

much of this decree as awarded interest and costs, appellant excepted and took an appeal therefrom. (Rec., 4.)

The assignment of errors, two in number, presents these two points and no more. (Rec., 6 and 7.)

To state it differently, it is insisted that the Circuit Court, in awarding interest and costs against appellant, proceeded with the case, not *in conformity with the opinion of this court*, but quite the contrary.

When the case was called up to be proceeded with by the Circuit Court on the mandate of this court, the parties, to simplify and put in as small a compass as possible the questions to be presented on this hearing, entered into the following agreement, and filed it in the case:

It is agreed between Hunter, Evans & Co., on the one part, and the City National Bank of Fort Worth, Texas, on the other part, that the proceeds of the cattle in controversy in this case were paid over to James F. Ellis, one of the securities on the replevin bond, who, for himself and as agent for the other securities on said bond, accompanied said cattle to the Indian Territory and collected the balance due on the note from Dawson to Hunter, Evans & Co. and said City National Bank, and that said Ellis, on behalf of himself and said other securities on said bond, deposited said amount collected by him in said City National Bank as a general deposit, with the understanding that said money should remain on deposit in said bank to abide the determination of this suit for the purpose of indemnifying them, said securities, against any loss by reason of their signing said bond.

Said deposit was made in the name of the "Dawson bond account," and the amount has remained and still remains on general deposit as aforesaid in said bank.

It is further agreed that said deposit was made at the following dates and in the following amounts respectively:

1. June 26th, 1880, three thousand one hundred and twenty-eight dollars.

2. August 3d, 1880, five thousand dollars.

3. August 6th, 1880, five thousand six hundred and forty-four dollars.

Total amount deposited, thirteen thousand seven hundred

and seventy-two dollars, which, as other general deposits, has been used by the bank as other of its funds.

It is further agreed that this agreement shall stand in lieu of answer to plaintiffs' bill of discovery, and answer to same is hereby waived. (*Rec., 2.*)

Before discussing the merits of the question at issue, it may be well to allude to the matter of appeal here, upon a sum less than the jurisdictional amount in ordinary cases, as some confusion may arise upon this point since the ruling in the case of the *Washington and Georgetown Railroad Company, 140 U. S., 91.* In that case affirmance was had, and nothing more, and the cause sent back to the court below for simply an enforcement of that judgment—no order to proceed further, etc.—no room was left for the exercise of discretion. The lower court, however, did proceed further, and exercised its discretion and added interest when this court had been silent as to interest. The court in this case did proceed as it was directed, but it went outside of the opinion of this court, and did, as appellant contends, what the law did not authorize. The distinction, and difference as well, in the two cases are clear and marked, and this case comes plainly under the ruling in *Perkins* v. *Fourniquet, 14 How., 328,* and reconciles any apparent conflict there may be between the case in 140 U. S., *sup.*, and the others of long standing. (Rose *v.* Himely, 5 Cr., 313; The Santa Maria, 10 Wheat., 431; Boyce *v.* Grundy, 9 Pet., 275.)

To say that after the court below was commanded to proceed in conformity with the opinion of this court, and it does proceed and puts an additional burden—not claimed or mentioned in the previous proceedings at all—on the bank of nearly or quite $4,000, and the bank can not appeal to see if this is in conformity with the opinion of this court, would be quite unreasonable, in fact harsh, and in the teeth of *Perkins* v. *Fourniquet, sup.*,

which this court, in *140 U. S., sup.*, quotes with approbation. And it is most earnestly submitted that, in no case, however small the amount added to a judgment or decree, after the mandate goes down that may be considered by the party as inconsistent with the opinion of this court, containing directions to proceed, as here, can a writ of error or appeal, as the case may be, be denied. In some of the cases cited above, the amounts added were only a few hundred dollars. This is but one manner, out of several permissible, to get this court to see if the lower court has not *misunderstood* or *misconstrued*, or both, the judgment or decree of this court—that is all. While there can be no doubt as to the correctness of this view of the matter, yet, should there be the least shade of one in this case upon the mind of any person, it seems this must be entirely removed and cleared away, as this is now a controversy solely and alone with a *national bank*, and the question of amount as to jurisdiction, for or against, is of no importance or significance (*Spear, Fed. Jud'y, 219, Cl. 10*, and cases there cited). This *fiscal agent*, or *financial instrument of the government*, on the account of which this case went out of the State court to the United States court, can not be hampered as to the amount in controversy.

Then, is the bank chargeable with interest on the amount of the decree?

This court, when it passed on the case before (129 U. S., *sup.*), had the whole matter before it, and disposed of it fully, as far as could then be done, and it was silent as to any interest of this sort, while *rule 23* of this court stood before it, as a permanent and exacting reminder for justice, by way of compensation for all improper delays and withholdings in payment of money. And this rule, differing then in number, in connection with the statute allowing interest, etc., was happily commented on by Mr. Justice

Story in *Boyce* v. *Grundy*, (*9 Pet., sup.*) This case (9 Pet.), with the others above referred to (140 U. S., 5 Cr., 10 Wheat.), denied the allowance of interest by the court below, after the mandate which gives not interest goes down. The argument might stop here.

But is the bank thus liable on general principles of law?

The agreement of the parties in this case (Rec. 2) shows the character of this deposit as it was found by this court (129 U. S., 564–5) "*on the Dawson bond account*" to remain as a general deposit "*to await the result of this suit.*"

The general law, regardless of the peculiarity of this deposit, would forbid any demand for interest on this mere general deposit.

Foley v. *Hill*, *1 H. L. Cas., 39–40;*
Haswell v. *Farmers, &c., 26 Vt., 100;*
Duncan v. *Magette, 25 Tex., 245;*
Newmark Bk. Deposits, sec. 114;
Boone Corp., secs. 219–220.

And this court, in passing upon the question of liability of banks for interest on deposits, rests it on grounds completely negativing the idea of interest in cases like this—a general deposit—the bank being a mere stakeholder or depositary at most.

National Bank v. *Graham, 100 U. S., 699;*
National Bank v. *Mechanics, &c., 94 Ib., 437.*

And this is in harmony with the general principle of law, as to deposits where the depositary is a mere stakeholder, and he is not found to be in default.

Story Bailm., sec. 45; Ib., 123 (3 edn.);
1 Domat (Cushing's edn.), p. 338, art. 10 (Cl., 721);
p. 617, art. 2 (Cl., 1587).

But again, *sec. 4507, Tit. 90, R. S., Texas (Sayles)*, provides, in short, that if the defendant replevy the property he should not be liable for the rents, hire, or revenue thereof; this is applicable here, for the reason that the money is simply the proceeds of the cattle, and if the

cattle had been returned in kind there would have been nothing to pay, and certainly it was optional whether the cattle should be returned in kind or the value of the cattle accounted for. This local law of Texas must, in the nature of things, have conclusive weight in this proceeding, as it is upon Texas laws alone, in the absence of congressional legislation, the law as to this question is to be determined.

Massachusetts, &c., v. *Miles*, 137 U. S., 689.

Again, the opinion of this court (129 U. S., *sup.*), plainly indicated that the plaintiffs were at fault in suing out the writ of sequestration, in that they had no title or right to the property in question; that the writ of sequestration was wrongfully obtained, and that they were not entitled to interest upon the value of the cattle. But if the court should hold that interest is recoverable, then it is certain that the opinion should be taken as holding, in effect, that interest was recoverable against Dawson and that it was not intended that the bank should pay this interest, the bank being, as before said, simply a stakeholder, or, at most, a depositary.

As for the judgment against the bank for costs, we think that is palpably erroneous, for the court indicates throughout that plaintiffs below were in default. Indeed, the court in such opinion intimated most clearly, that were it not for the fact that the money was shown to be on hand that it would order plaintiff's bill to be dismissed. And as costs are in the nature of damages or punishment for default, and we have shown the bank is not in default, the same reasons that relieve it of interest will also relieve it of costs.

It is obvious, then, the lower court did not proceed upon the mandate in this case, *in conformity with the opinion of this court*, but flew in the face of it in awarding interest and costs, and therefore its decree is respectfully asked to be reversed.

A. H. GARLAND,
H. J. MAY,
For Appellant.

Office Supreme Court U. S
FILED.
JAN 30 1894
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM NO. 264.

THE CITY NATIONAL BANK OF FORT WORTH,
Appellant,
vs.
R. D. HUNTER, A. G. EVANS AND M. P. BUEL, Partners, under the firm name of Hunter, Evans & Co.,
Appellees.

STATEMENT AND BRIEF OF APPELLEES.

H. M. POLLARD,
Attorney for Appellee.

PRINTED BY CENTRAL LAW JOURNAL, ST. LOUIS.

Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM NO. 264.

THE CITY NATIONAL BANK OF FORT WORTH,
Appellant,
vs.
R. D. HUNTER, A. G. EVANS AND M. P. BUEL, Partners, under the firm name of Hunter, Evans & Co.,
Appellees.

STATEMENT AND BRIEF OF APPELLEES.

STATEMENT.

This cause having been once before this court, being reported in 129 U. S. Reports, at page 557, and as the decision therein contains a full statement of the case, it will be necessary to review those matters which are contained in the two records, viz: the record to the first appeal, which will be designated as (R), and the record in this appeal which will be designated as (R. No. 264), which are material to a proper discussion of the questions raised by the assignments of error.

On May 20th, 1880, one Oneal was indebted to plaintiffs and to defendant bank, each of whom claimed to hold liens therefor upon certain cattle owned by Oneal. At said date, one Dawson was desirous of purchasing Oneal's cattle, provided he could get the consent of plaintiffs and

defendant bank. Oneal communicated this fact to plaintiffs and to defendant bank, and on said day all the parties in interest met at Fort Worth where three written agreements were entered into; the first was between Oneal and Dawson, reciting that, whereas plaintiffs and the defendant bank had liens on the cattle, and whereas plaintiffs and defendant bank had agreed to sell the cattle to Dawson, at the prices in said agreement mentioned, and whereas plaintiffs and defendant bank had agreed with Dawson upon the time and place of payment for said cattle, to the amount of their debt, or so much thereof as said cattle might bring, and also upon the manner and amount of security for said payment by said Dawson; therefore Oneal in consideration of these agreements, and for the further consideration of the release of his said indebtedness to plaintiffs and defendant bank, agreed to gather and deliver the cattle to Dawson at, or near Wills Point. Dawson bound himself to pay for the cattle at the prices therein named, making them, in such way as plaintiffs and defendant bank might require, and payable to them. The second agreement was between plaintiffs, defendant bank, and Oneal, whereby plaintiffs and defendant bank agreed to the sale of the cattle by Oneal to Dawson, provided Oneal should upon the delivery of the cattle, turn over to plaintiffs and defendant bank, Dawson's paper, together with the contract of sale, and plaintiffs and defendant bank agreed to receive such paper and contract, in discharge of their respective claims upon Oneal, provided such proceeds equaled said claims; and if such proceeds should be less than said indebtedness, plaintiffs and defendant bank agreed to divide the same *pro rata;* if there should be a deficiency, Oneal obligated himself to make it good in cash or notes, secured to the satisfaction of plaintiffs and defendant bank. If there should arise a dispute as to the amount Oneal owed either party, then the amount agreed to be due should be adjusted and discharged, and the amount in dispute should

be secured by Oneal as aforesiad; and when the dispute should be settled, the amount found due by such settlement should be paid from said proceeds of sale, to Dawson, or said security furnished by Oneal. Should there be a deficiency it was to be carried, owned and held between plaintiffs and defendant bank, according to their respective claims, and the collection arising therefrom to be prorated between them. The third agreement was between Dawson, plaintiffs and defendant bank, and recited the existence of the indebtedness and liens, and the fact that Oneal had contracted for the sale of the cattle to Dawson; that in the event the cattle sold and delivered by Oneal to Dawson should be insufficient to discharge the amount of the indebtedness in full, then Dawson assumed to pay off and discharge the indebtedness *pro rata*, to the extent of the cattle received, payment to be made by Dawson to plaintiffs and defendant bank by October 1st, 1880. The said sale was stated to be subject to the liens, *and the cattle were to be held in trust for plaintiffs and defendant bank;* that plaintiffs and defendant bank should select a man to accompany Dawson from Texas to the point where the cattle might be sold, and this man was to have the legal possession of the cattle and receive the proceeds of the sale; Dawson was to have the handling, control and disposition of the cattle, subject to the provisions of the agreement.

On May 22d, the different parties to these agreements met at Wills Point, and the cattle were delivered to Dawson, he executing a note for $19,033.00, as the purchase price of the cattle, said note being payable to the order of plaintiffs and defendant bank, and to be paid according to the terms and stipulations contained in the said agreement between Dawson, plaintiffs and defendant bank. This note was handed to Gen ral McCulloch, who had been selected by plaintiffs and defendant bank, as their joint

agent to accompany said cattle, and receive the proceeds of sales made by Dawson.

At this time the indebtedness of Oneal to defendant bank was admitted to be $40,339.85. The indebtedness of Oneal to plaintiffs, however, was in dispute; plaintiffs claiming that Oneal owed them about $18,000.00 all of which Oneal disputed, except $9,915.74. Taking the 10,-339.85, the indebtedness due the bank, and the undisputed indebtedness of $9,915.74 due plaintiffs, as a basis for pro-rating the $19,033.00 with interest to be received from Dawson, it was then agreed that of every $1,000.00 General McCulloch collected, he should pay to defendant bank $510.48, and to plaintiffs $482.52. On the same day of the Wills Point meeting, General McCulloch collected from Dawson $3,419.00, being the proceeds of cattle sold by Dawson on that day, and of said amount paid plaintiffs $1,668.56, and defendant bank $1,750.44.

On May 25th, 1880, General McCulloch again received from Dawson, as the proceeds of cattle sold by him, a draft for $1,842.00 which he turned over to plaintiffs, and at the same time drew on them for $939.88, the bank's *pro rata* of said sum. Tais draft plaintiffs refused to accept and retained the full $1,842.00.

On May 31st, 1880, plaintiffs began suit in Montague County, Texas, against Oneal and Dawson, claiming a lien on the cattle then in the possession of Dawson, which lien they alleged existed by virtue of a mortgage, given by Oneal to them, and prayed the foreclosure of said lien, and sequestered the cattle then in the possession of Dawson.

On June 2d, Dawson, by the aid of defendant bank, replevied said cattle, the defendant bank furnishing the securities upon the replevin bond, and agreeing to hold them harmless from any liability therein; two of said securities, viz: Lomax and Nichols, were cashier and vice-president, respectively, of the bank. (Appellant's original brief, 21-116.)

After the cattle were replevied by Dawson, General McCulloch was notified by defendant bank that his agency for them had terminated, and he thereupon ceased to act as agent for plaintiffs and defendant bank, and entered the employ of Dawson as a hand and guide to go with the cattle. R. 221-282.

On June 21st, plaintiffs sued out a supplemental writ of sequestration, and seized thereunder certain cattle owned and then in the possession of Oneal; of these Oneal replevined $110.00 worth of cows and calves. The remaining cattle held by plaintiffs under this supplemental writ of sequestration were appraised at $2,424.56.

Some time during the months of June and July, Dawson sold the cattle replevined by him from plaintiff. The proceeds of these sales to the amount of $13,772.00, being the balance due on the Dawson note to plaintiffs and defendant bank, exclusive of interest, which it appears was not paid, were collected by one Ellis, one of the securities on the replevin bond, and the agent of defendant bank, and by him paid to said bank at the following time, and in the following amounts, to-wit: June 26th, 1880, $3,128.00, August 3d, 1880, $5,000.00, and August 6th, 1880, $5,644.00; a total of $13,772.00.

The record discloses that this money was paid to Ellis, and by him paid to the bank under the following circumstances:

General McCulloch, a witness for the defendant bank, testifies:

"*When Dawson replevined, the bank notified me that my agency had ceased on their part. A day or two after this, Mr. Ellis came to the herd with a bill of sale from Dawson of the cattle, made to the City National Bank of Fort Worth, and their power of attorney to make title to cattle as sold by Dawson, and received the proceeds of the sale for the bank.* This, in my judgment, superseded my agency under Dawson, and I traveled with the herd looking to

Dawson's interest in the management of the hands and cattle, and aiding Mr. Ellis until the heifers were delivered to Mr. Allen by Mr. Ellis."

"As Mr. Ellis delivered the cattle to Mr. Allen for Dawson, and had authority from the bank to receive the money from Dawson, or the purchaser of the cattle, I suppose he did receive the money for them, and paid it over to the party to whom it was properly due from him." Rec. 282-284.

Lomax, cashier of defendant bank, and a witness for it, testifies:

"*John Dawson paid the full amount of what remained due on his note to Hunter, Evans & Company, and the bank, after the credits made by McCulloch, which amount is now held by the bank, awaiting the judgment of the court in this cause.*" Rec., 218.

Nichols, vice-president of defendant bank, and a witness in its behalf, testifies:

"*Mr. Dawson paid over to the bank what remained due on his note to the bank, and Hunter, Evans & Co., and it is now held by the bank, awaiting the decision of this cause.*" R., 218.

Counsel for appellants in this cause, when it was first before this court on appeal, say in their brief:

"When Dawson sold the cattle afterwards, he paid the amount of the note and interest (?) into the City National Bank which has ever since held the same to await the result of this trial."

"*Dawson was dependent upon the bank for securing his replevin bond, and necessarily had to give up the money, and lose the use of the proceeds of the cattle to indemnify it for becoming his security.*" (Appellant's original brief, 21.)

"*Dawson was only able to give such bond by selling the cattle after they were released, and allowing an agent of the bank to collect and hold the purchase money to indemnify it*

for providing for him sureties for his replevin bond. The bank continues to hold the money for its own protection." (Appellant's original brief, 41.)

The stipulation contained in the record in this appeal recites that the proceeds, amounting to $13,772.00 of the cattle in controversy was paid over to Ellis, one of the securities in the replevin bond, who, for himself, and as agent for the other securities, collected said amount, and that said Ellis, on behalf of himself, and said other securities on said bond, deposited said amount collected by him in said City National Bank, as a general deposit, with the understanding that said money should remain on deposit in said bank, to abide the determination of this suit for the purpose of indemnifying them the said securities, against any loss by reason of their signing said bond. Said deposit was made in the name of the "*Dawson bond account*," and the amount has remained and still remains, on general deposit as aforesaid in said bank, *which said deposit as other general depoits, has been used by the bank as other of its funds.*

The suit brought by plaintiffs in Montague County, was removed to the United States Circuit Court, and plaintiffs filed an amended bill with the praver in the alternative, viz: That their lien be foreclosed, and if they were mistaken in their remedy, *they pray for a decree against Dawson and defendant, the said City National Bank, for the amount of money coming to them from the proceeds of said cattle sold by Dawson and paid to defendant bank.*

Thereupon the said cause was heard in the United States Circuit Court, and it was decreed by said court, among other things, that on May 22d, 1880, Oneal was indebted to plaintiffs in the sum of $18,333.60 and to defendant bank in the sum of $10,339.85, and that plaintiffs were entitled at said date to the sum of $12,169.64 out of the Dawson note, less the sum received by them from the proceeds of said note, to-wit: $1,668.49 paid May 26th,

1880, and the sum of $1,842.00 paid June 26th, 1880, with interest from May 22d, 1880; and it was further decreed that plaintiffs pay to defendant bank the sum of $1,311.50, being its *pro rata* of the $2,424.56 of cattle sequestered from Oneal by plaintiffs. R., 285.

Upon appeal to this court the cause was reversed and remanded to the said Circuit Court and it was ordered to enter a decree in accordance with the following directions.

The amount due by Oneal to plaintiffs, on February 20th, 1880, was fixed by this court at $16,995.58, upon which interest was to be calculated, and added at 6 per cent. on the average monthly balances after August 20th, 1879, down to the date at which Dawson paid the balance due on his note into the bank; and that the bank's debt should be ascertained by adding interest to Oneal's note, held by it, for $9,830.11 from December 10th, 1879, down to the date when Dawson paid the balance on his note into the bank. From these two indebtednesses, the *pro rata* to which plaintiffs and defendant bank were entitled, were to be computed, and from the amount, according to this computation, to come to plaintiffs should be deducted the payment of $1,668.50 paid May 22d, and $1,842.00 paid June 22d, and $340.00, the value of the cattle replevined by Oneal of July 17th, and $2,424.56, the value of the cattle sequestered from Oneal, as of July 20th all in 1880, with interest, and the balance of the amount due plaintiffs, should be decreed to be paid out of the money deposited by Dawson *as of the date of such deposit*, the bank retaining the remainder. 129 U. S. Rep. 557.

The cause again coming on for hearing in the Circuit Court, in conformity with the directions of this Honorable Court, it was decreed by said Circuit Court, on the 2nd day of June, 1890: That plaintiffs have and recover of, and from the defendant, the City National Bank of Fort Worth, the sum of $12,084 85, together with interest thereon from this date at the rate of eight per cent. per annum, and that all costs

accrued in this cause up to September 30th, 1881, be adjudged against plaintiffs, and as the costs of the Supreme Court have been allowed against said plaintiffs, all other costs incurred herein, which have not been otherwise adjudged, be, and the same is hereby adjudged against said defendant, the City National Bank of Fort Worth. R., No. 264, 3-4.

From this decree defendant bank appeals and makes the following assignments of error:

FIRST. That the court erred as to the said defendant bank by giving to plaintiff, as against said bank, interest on plaintiff's portion of said fund.

SECOND. That the court erred in awarding costs against defendant bank.

BRIEF.

I.

It is submitted that the Circuit Court committed no error in awarding interest on plaintiffs' *pro rata* against the defendant bank, for three reasons:

a. Because the bank was a trustee, *quasi* trustee, as to plaintiffs, of all funds received by it over and above its *pro rata*, from the Dawson note, and having used plaintiffs' share of said funds in its business, it is liable for interest.

b. Because the $15,772.00, deposited with it, as the proceeds of the Dawson note, whether by Ellis on behalf of himself, and the other securities of Dawson's replevin bond, or by Ellis as agent of the bank, was, under the circumstances, a specific deposit or bailment for the benefit of plaintiffs upon which defendant bank is liable for interest, when the fund was used by it.

c. Because by the direction of this Honorable Court the said Circuit Court was ordered to award to plaintiffs interest on their *pro rata* after making certain deductions, of

the funds in the hands of the bank, from the date of such deposit.

That the defendant bank was a trustee of that portion of the $13,772.00 belonging to plaintiffs, and paid into its hands, seems to be so clear, as to admit of no dispute.

At the time of the meeting at Fort Worth, when the different agreements were entered into, both plaintiffs and defendant bank claimed to have liens upon the cattle, but as there was a serious doubt as to which of the liens had priority, it was agreed, to use the language of the writing entered into between plaintiffs, defendant bank and Dawson, that the sale from Oneal to Dawson "is made subject to the liens of Hunter, Evans & Co., and the City National Bank, *and that said Dawson hold said cattle in trust for said Hunter, Evans & Co., and the said City National Bank.*" R., 227.

The defendant bank seemed to place the same construction upon this agreement, as it is recited in its answer to plaintiffs' amended bill, viz.: "That the purpose of the agreements was to sell the cattle to Dawson, free from all liens, before existing against them, *but charged with a new lien or trust to be enforced through the agency of McCulloch.*" R., 75.

Again in said answer it was said, "But it was to the new and specific lien or trust, created by said Dawson, in favor of plaintiffs and said bank jointly, that reference was meant and intended by the expressions in said agreement between said Dawson, plaintiffs and defendant bank, in regard to said Dawson's possession of said cattle." R., 76.

That this Honorable Court considered this agreement as constituting a trust for the benefit of plaintiffs, and defendant bank, to be worked out through the agency of McCulloch, who was to have legal possession and receive the proceeds of said cattle, is a clear inference from the language of this court as reported in 129 U. S. Rep. at pages 560, 568.

If the balance due on the Dawson note had been paid to it by Dawson, the bank would have been a trustee, as to plaintiffs, of that portion belonging to them. And *a fortiori* is this true when it notified General McCulloch that his agency had ceased, and took possession of the herd through its agent Ellis, armed with a bill of sale from Dawson to it of the cattle, and with a power of attorney from defendant bank to make title to cattle as sold by Dawson and receive the proceeds of the sale for it. And when Ellis paid said proceeds to defendant bank it received plaintiffs' *pro rata* as trustee for them, notwithstanding they were deposited as a general deposit by Ellis in the case of the "Dawson bond account" on behalf of himself, and the other securities on Dawson's bond. Defendant bank then contended, and now contends, that the sequestration of the cattle by plaintiff did not rescind the original trust agreement, and as it knew that this money was paid to it by Ellis, for Dawson, on account of said agreement, and in payment of Dawson's note, and that plaintiffs were entitled to their *pro rata* of the same, it was not justified in withholding their share of the same from him, pending the termination of this suit.

Plaintiffs had nothing to do with the agreement of defendant bank to indemnify Dawson's securities on his replevin bond; that was a contract peculiarly between the bank and the securities, and the bank had no authority, or right, to empower Ellis to collect the trust fund, belonging to plaintiffs and the bank, or to receive the same, and hold it for the purpose of indemnifying the securities, or itself, by reason of said bond or said agreement with the securities thereon.

Defendant bank knew at the time this money was paid to it, that plaintiffs were entitled under the *pro rata* made at Wills Point, after deducting $1,842.00 paid to them by McCulloch, and the $2,424.56 the value of the property sequestered from Oneal, and the $110.00 of cattle replevied

by Oneal, to about $4,400 of said $13,772.00, and yet knowing this, it not only failed to pay the same to plaintiffs as *ex aequo et bono* it should have done, but on the contrary used it, as it has continued to do up to this date, in the same manner that it has used its other funds, thereby incurring a liability to pay interest on that portion of the funds belonging to plaintiffs, from the date of its receipt.

Perry on Trusts, Sections 429-430 (4th ed.)
Lewin on Trusts and Trustees, *pp. 338-343, note 1, p. 338 (Am. notes by Flint, 1888).
Kerr v. Laird *et al.*, 27 Miss. 544.
Hill on Trustees, *374, note 2.
Lewis v. Bradford, 8 Ala. 632.
Am. & Eng. Encyclopedia of Law, VII, pp. 395-6-7-8.

Plaintiffs in their amended bill filed September 20th, 1881, prayed a decree against defendant bank for the amount due them from the proceeds of said cattle, then in its hands, under the agreement entered into between them, defendant bank and Dawson, and yet defendant bank in its answer to said bill did not tender to plaintiff the amount due them, but continued to use the same.

After this demand made by plaintiffs, it was unquestionably the duty of the bank to pay the same, and its failure and refusal to do so made it liable for interest or damages as a trustee *de son tort*.

Under these circumstances it would have been liable for damages, the measure of which would be the legal rate of interest, for withholding the same from plaintiffs, in an action for money had and received to use of plaintiffs.

Close v. Fields, 13 Tex. 624.
Porter v. Wash, 1 Ala. 452.
Pease, Ex. v. Barber, 3 Caines (N. Y.), 265.
Marvin v. McRea, 1 Cheves (S. C.), 61.

The payment made by Ellis into defendant bank, although designated by it as a general deposit, was nevertheless, under the circumstances, not such, either as a matter of fact or of law. It was not deposited in the name of any person who had a right to check against it. The defendant bank would not have honored the check of Dawson, or of Ellis, or of any of the securities on the replevin bond, drawn on the fund. As between the defendant bank and Ellis or Dawson, or the securities on the replevin bond, for whom the payment was made, *the relation of debtor and creditor did not exist as to the fund.* This was necessary to constitute it a general deposit.

Bank of Republic v. Millard, 10 Wall. 152.
In re Franklin Bank, 1 Paige, 254.
Foley v. Hill, 2 H. L. Cases, 28.
Bolles on Banks & Depositors, Sec. 34.

On the other hand it was paid in for a specific purpose, *i. e.*, to abide the termination of this suit, for the purpose of indemnifying the bank upon its agreement to hold harmless the securities on Dawson's replevin bond. It was deposited not to the credit of Ellis or Dawson, but to the "Dawson Bond Account." This made it a specific deposit, or bailiment, and as such it bore interest when used by defendant bank.

Morse on Banks and Banking, Sec. 567 (3d Ed.)
Story on Bailiments, Secs. 88, 123.

It was the intention of this Honorable Court, as expressed in the opinion in 129th U. S. Rep. 557, and in its directions to the Circuit Court, that interest should be awarded plaintiffs by said Circuit Court upon their pro rata.

This is apparent, not only from the order of the court that plaintiffs have a decree against defendant bank, for their pro rata, *as of the date of the payment of the fund into its hands*, but also from the fact that it charged plaintiffs

with interest on the whole of the payment of $1,842.00, paid to them by McCulloch, a portion only of which belonged to defendant bank, and on the sums of $2,424.56 and $110 respectively, from the respective dates of their receipt by plaintiffs.

The Circuit Court, in awarding plaintiffs interest on its pro rata of the fund in the hands of the defendant bank, from the date of the deposit to the time the decree was entered, followed Article 2980 of Texas Civil Statutes which provides:

"All judgments of the several courts of this State shall bear interest at the rate of eight per cent. per annum from and after the date of the judgment."

II.

The second and last assignment is that the Circuit Court erred in awarding certain costs against defendant bank.

It is submitted that this assignment is not well taken.

The Circuit Court awarded all costs up to September 30th, 1881, the date when plaintiffs filed their amended bill. This Honorable Court awarded the costs of the former appeal against plaintiffs.

In plaintiffs' amended bill they prayed a decree against defendant bank, for their *pro rata* of the funds in its hands. The defendant bank could have avoided further costs by making a tender in their answer to that bill. Having failed to do so, and having disputed plaintiffs' right to recover, the bank put itself in a position of incurring costs should the decree be adverse to it.

Article 1421 of the Texas Civil Statutes provides:

"The successful party to a suit shall recover of his adversary all the costs expended or incurred therein, except when it is, or may be otherwise provided by law."

It is respectfully submitted that the Circuit Court committed no error and that its decree should be affirmed.

H. M. POLLARD,

Attorney for Appellee.